UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

JACOB FETMAN,

Plaintiff,

-against-

AISH HATORAH NEW YORK, INC.; METLIFE, INC.; MARSHAL MARTIN BIENSTOCK; GOLDBERG & RIMBERG PLLC,

Defendants.

15-CV-7440 (LAP)

ORDER OF DISMISSAL

LORETTA A. PRESKA, Chief United States District Judge:

Plaintiff, appearing *pro se*, brings this action alleging that Defendants colluded in depriving Plaintiff of his property. By order dated September 29, 2015, the Court granted Plaintiff's request to proceed without prepayment of fees, that is, *in forma pauperis*. For the reasons set forth below, the action is dismissed.

STANDARD OF REVIEW

The Court must dismiss an *in forma pauperis* complaint, or portion thereof, that is frivolous or malicious, fails to state a claim on which relief may be granted, or seeks monetary relief from a defendant who is immune from such relief. 28 U.S.C. § 1915(e)(2)(B); *see Livingston v. Adirondack Beverage Co.*, 141 F.3d 434, 437 (2d Cir. 1998). While the law mandates dismissal on any of these grounds, the Court is obliged to construe *pro se* pleadings liberally, *Harris v. Mills*, 572 F.3d 66, 72 (2d Cir. 2009), and interpret them to raise the "strongest [claims] that they *suggest*," *Triestman v. Fed. Bureau of Prisons*, 470 F.3d 471, 474-75 (2d Cir. 2006) (internal quotation marks and citations omitted) (emphasis in original).

BACKGROUND

On June 2, 2015, Defendant Goldberg & Rimberg, attorneys for Defendant Aish HaTorah New York, filed an execution of judgment in New York State Supreme Court, Kings County, commanding the Marshal for the City of New York to satisfy a judgment entered against Plaintiff. (Compl. at 3, 7-8.) On or around June 10, 2015, Defendant Martin A. Bienstock, Marshal for the City of New York, served Plaintiff with notice that money or property belonging to him may have been taken to satisfy that judgment and that certain money or property may be exempt. (*Id.* at 6.) The notice provided a partial list of money which may be exempt and informed Plaintiff that New York State law "provides a procedure for determination of a claim to an exemption." (*Id.*) In a letter dated June 25, 2015, Defendant MetLife informed Plaintiff that in response to a Notice of Levy received by MetLife from Aish HaTorah for the amount of $23,836,171.23, MetLife "processed a full surrender on [Plaintiff's] annuity contract," in the amount of $138,533.80." (*Id.* at 5.)

Plaintiff asserts that "[d]espite attempts to contact[ ] the Marshal to ascertain what this notice related to, no explanation was given." (*Id.* at 3.) He also claims that "[d]espite multiple attempts to get this situation resolved, the defendants continue in collusion to hold this money." (*Id.* ¶ III(C).) He seeks reimbursement of his retirement account. (*Id.* ¶ V.)

DISCUSSION

A. 42 U.S.C. § 1983

Mindful of the Court's duty to construe *pro se* pleadings liberally, *Harris*, 572 F.3d at 72, the Court construes Plaintiff's deprivation of property claim as arising under the due process clause of the Fourtheenth Amendment to the United States Constitution in violation of 42 U.S.C. § 1983.

To state a claim under § 1983, a plaintiff must allege both that: (1) a right secured by the Constitution or laws of the United States was violated, and (2) the right was violated by a person acting under the color of state law. *West v. Atkins*, 487 U.S. 42, 48 (1988).

B. Due Process

The Due Process Clause protects only against deprivations without due process of law. *Rivera–Powell v. N.Y. City Board of Elections,* 470 F.3d 458, 464 (2d Cir. 2006) (quoting *Parratt v. Taylor,* 451 U.S. 527, 537 (1981)). To state a procedural due process claim, a plaintiff must allege "that (1) he possessed a liberty interest and (2) defendants deprived him of that interest without sufficient process." *Walker v. Fischer,* 523 F. App'x 43, 44 (2d Cir. 2013) (citing *Giano v. Selsky,* 238 F.3d 223, 225 (2d Cir. 2001)). The hallmarks of due process are notice and an opportunity to be heard. *See, e.g., Mullane v. Cent. Hanover Bank & Trust Co.,* 339 U.S. 306, 314 (1950) ("An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections."); *Brody v. Vill. of Port Chester,* 434 F.3d 121, 131 (2d Cir. 2005) (holding that "if reasonable notice and opportunity for a hearing are given, due process will be satisfied"). The state must simply make an adequate procedural remedy available to the plaintiff; the plaintiff need not have availed himself of that remedy. *See, e.g., McKesson Corp. v. Div. of Alcoholic Beverages & Tobacco,* 496 U.S. 18, 38-39 & n.21 (1990); *Adams v. New York State Educ. Dep't,* No. 08-CV-5996 (AJP), 2010 WL 624020, at *31 (S.D.N.Y. Feb. 23, 2010), *adopting report and recommendation*, 705 F. Supp. 2d 298 (S.D.N.Y. 2010).

Where a person is deprived of a property right because of a random and unauthorized act, rather than through the operation of established state procedures, the Due Process Clause is satisfied if the state provides an adequate postdeprivation remedy. *See Hudson v. Palmer*, 468 U.S. 517, 533 (1984) (holding that a "random and unauthorized" deprivation of a protected interest does not result in a violation of procedural due process, as long as the state provides an adequate postdeprivation remedy); *Rivera–Powell,* 470 F.3d at 465 (holding that "[w]hen the state conduct in question is random and unauthorized, the state satisfies procedural due process requirements so long as it provides meaningful post-deprivation remedy.").

1. Levy Procedures

On or about June 10, 2015, Defendant City Marshal Bienstock served Plaintiff with notice that pursuant to court order some of Plaintiff's money was taken but that some of that money may be exempt from seizure. The notice included language referencing New York Civil Practice Laws and Rules, Sections 5239 and 5240, the New York State statutes that provide a procedure for a state court to determine whether taken property or money is exempt. Section 5239 permits "any interested person" to commence a special proceeding prior to an enforcement officer satisfying judgment where a "court may vacate the execution or order, void the levy, direct the disposition of the property or debt, or direct that damages be awarded." C.P.L.R. § 5239. Section 5240 authorizes the court to issue an order "denying, limiting, conditioning, regulating, extending or modifying any enforcement procedure." *Id.* § 5240.

New York postdeprivation procedures in levy cases satisfy due process. *McCahey v. L.P. Inv'rs*, 774 F.2d 543, 549 (2d Cir. 1985). "[P]ost-judgment remedies satisfy due process requirements if they provide: (i) notice to judgment debtors that their property had been seized; (ii) notice to judgment debtors of exemptions to which they may be entitled; and (iii) a prompt opportunity for judgment debtors to challenge the seizure and assert their exemptions." *Id.*

2. Defendant City Marshal Martin Bienstock

Plaintiff's claims against Bienstock must be dismissed because Plaintiff does not allege facts that support the conclusion that postdeprivation procedures were unavailable or inadequate. Plaintiff received notice that his money was seized and listed types of money that are exempt from seizure. That notice also referenced the state statutes that provide a procedure to challenge a seizure. Plaintiff does not allege that he has taken advantage of that procedure in state court. Rather, Plaintiff states that he contacted Defendant Bienstock and then, not receiving the information he sought from Bienstock, filed this lawsuit. This Court, however, does not hear challenges to the execution of state court judgments; that challenge is made available in state court pursuant to §§ 5239 and 5240 of the Civil Practice Laws and Rules. *See McCahey*, 774 F.2d at 549. Should Plaintiff believe that the money seized from his pension is exempt, he must avail himself of the state procedures that provide him with an opportunity to challenge that seizure.

As a postdeprivation remedy exists, and Plaintiff does not state that he has taken advantage of that remedy, his due process claim against Bienstock is dismissed for failure to state a claim. 28 U.S.C. § 1915(e)(2)(B)(ii).

3. Private Parties

This action is dismissed as to the remaining defendants because they are private parties. A claim for relief under § 1983 must allege facts showing that each defendant acted under the color of a state "statute, ordinance, regulation, custom or usage." 42 U.S.C. § 1983. Private parties are therefore not generally liable under the statute, *Sykes v. Bank of America*, 723 F.3d 399, 406 (2d Cir. 2013) (citing *Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass'n*, 531 U.S. 288, 295 (2001)); *see also Ciambriello v. Cnty. of Nassau*, 292 F.3d 307, 323 (2d Cir. 2002)

("[T]he United States Constitution regulates only the Government, not private parties."). As Defendants Aish HaTorah New York, MetLife, and Goldberg & Rimberg are private parties who do not work for any state or other government body, Plaintiff has not stated a claim against these defendants under § 1983. The action as to these Defendants are dismissed on this basis for failure to state a claim. 28 U.S.C. § 1915(e)(2)(B)(ii).

CONCLUSION

The Clerk of Court is directed to assign this matter to my docket, mail a copy to Plaintiff, and note service on the docket. Plaintiff's complaint, filed *in forma pauperis* under 28 U.S.C. § 1915(a)(1), is dismissed pursuant to 28 U.S.C. § 1915(e)(2)(B)(ii).

The Court certifies under 28 U.S.C. § 1915(a)(3) that any appeal from this order would not be taken in good faith, and therefore *in forma pauperis* status is denied for the purpose of an appeal. *See Coppedge v. United States*, 369 U.S. 438, 444-45 (1962).

SO ORDERED.

Dated: December 23, 2015
New York, New York

Loretta A. Preska

LORETTA A. PRESKA
Chief United States District Judge